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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 171 68

LESTER E. BANNING,
Petitioner and Cross-Respondent,

vs.

DETROIT, TOLEDO & IRONTON RAILROAD COMPANY,
Respondent and Cross-Petitioner.

PETITIONER'S REPLY TO RESPONDENT'S ANSWER FILED IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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INDEX.

Subject Index.

PAGE

Question of importance 2

Argument 4

Failure to question rulings of Court of Appeals is not fatal to Banning's petition..... 4

The Court of Appeals incorrectly decided that the District Court was in error in submitting to the jury the issue of the alleged negligence of the railroad company in that Banning "Was directed and required to work in the yard under muddy conditions so that his boots became slippery and covered with mud" 10

Conclusion 15

Table of Cases Cited.

American Construction Company v. Jacksonville, T. & K. W. Ry. Co., 148 U. S. 372, 37 L. Ed. 486..... 9

Bailey v. Central Vermont Ry. Co., 319 U. S. 350, 63 S. Ct. 1062 (1943) 8

Bigelow v. R.K.O. Radio Pictures, 327 U. S. 251, 66 S. Ct. 574 ..... 2, 3

Callen v. Pennsylvania R. Co., 332 U. S. 625, 68 S. Ct. 296 (1948) 9

Cross v. Ryan, 124 F. 2d 883 12

Dryfoos v. Scavenger Service Corp., 7th Cir., 115 F. 2d 637 (1940) 3

George A. Fuller v. Otis Elevator Co., 245 U. S. 489, 62 L. Ed. 422 9

Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740 ..... 13, 14

Scott v. Baltimore & O. Ry. Co., 3rd Cir., 151 F. 2d 421 (1945) 14

Spiller v. Atchison, T. & S. F., 253 U. S. 117, 64 L. Ed. 810 9

Stanczak v. Penn. Ry. Co., 7th Cir., 174 F. 2d 43 ..... 2, 3, 9

Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29 14

Tiller v. Atlantic Coast Line Ry. Co., 323 U. S. 574, 65 S. Ct. 421 (1945) 4, 9

U. S. v. Gulf Refining Co., 268 U. S. 542, 69 L. Ed. 1082 9

Federal Employers' Liability Act, 45 U.S.C.A. 51 7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948.

No. 771

LESTER E. BANNING,
Petitioner and Cross-Respondent,

vs.

DETROIT, TOLEDO & IRONTON RAILROAD COMPANY,
Respondent and Cross-Petitioner.

PETITIONER'S REPLY TO RESPONDENT'S ANSWER FILED IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Lester E. Banning, by his attorneys, filed his petition in this honorable court asking that writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on April 5, 1949. Respondent, through its attorneys, filed its answer in op-

position to the issuance of a writ of certiorari and this reply is addressed to respondent's answer.

Question of Importance.

The question involved is important. If the rule laid down by this Court in the case of *Bigelow* v. *R.K.O. Radio Pictures,* 327 U. S. 251, 66 S. Ct. 574, does not apply to Federal Employers' Liability cases as contended by the respondent, then the precise question presented in our petition for certiorari has never been decided by this Court. If the rule laid down in the *Bigelow* case does apply to Federal Employers' Liability cases then petitioner is entitled to a reversal of the decision of the Court of Appeals Sixth Circuit.

The question involved is purely a question of law governing cases under the Federal Employers' Liability Act, regarding which, there is a diversity of decisions in the United States Court of Appeals. In addition to the cases we cite in our brief in support of our petition for certiorari (see pages 12 to 14) we ask the Court to consider *Stanczak* v. *Pennsylvania R. Co.,* 174 F. 2nd 43, at page 47, where the Court said:

> "There being evidence from which the jury may reasonably have inferred that Stanczak came to his death by one of the means suggested above and upon which to base a finding that such means involved negligence on the part of the appellant under the circumstances shown by the evidence, it is not within the function of this court to go back to the jury's verdict to consider other possible means not involving negligence on the part of appellant (*Lavender* v. *Kurn,* 327 U. S. 645; *Tiller* v. *Atlantic Coast Line R. Co.,* 318 U. S. 54; *Bailey* v. *Central Vermont R. Co.,* 319 U. S. 350)."

Both the petitioner and respondent agree that the decision of the Court of Appeals is in conflict with applicable decisions of other United States Courts of Appeals (see page 4 of respondent's cross-petition) and both respectfully ask that the court take and finally decide the question involved.

The decision of the Court of Appeals in the case at bar is directly opposed to the rule of law governing the presented question as laid down by this court in *Bigelow* v. *RKO Radio Pictures,* 327 U. S. 251, 66 S. Ct. 574 and in the cases of *Stanczak* v. *Pennsylvania Railroad Company,* 7th Cir., 174 F. 2d 43 and *Dryfoos* v. *Scavenger Service Corporation,* 7th Cir., 115 F. 2d 637 (1940).

ARGUMENT.

(For the convenience of the Court we reply to Respondent's answer under corresponding headings.)

Failure to question rulings of Court of Appeals is not fatal to Banning's petition.

Respondent, by its answer, apparently is trying to lead this court to believe that there were two issues acted upon by the Court of Appeals. In fact there were two acts of negligence charged as constituting the act of negligence in failing to furnish plaintiff with a safe place in which to work.

The Court of Appeals set aside a final judgment and granted a new trial on a single, pure question of law, which, if erroneously decided would nullify the new trial and entitle the petitioner here to reinstatement of the judgment of the District Court. This Court in *Tiller* v. *Atlantic Coast Line R. Co.*, 323 U. S. 574, 65 S. Ct. 421 (1945), granted certiorari in which the principal issue presented was exactly the same as the case at bar, where the Court of Appeals granted a new trial and set aside a judgment obtained by the employee in the District Court on the ground that an erroneous proposition of law had been submitted to the jury. This Court held that the proposition of law as stated by the District Court was correct, set aside the grant of a new trial by the Court of Appeals, and reinstated the judgment entered by the District Court.

In reply to respondent's contention that the Court of Appeals found that the District Court committed three

separate errors in regard to the reception and rejection of testimony, may we say that a reading of the decision of the Court of Appeals not only indicates but says (410):

> "The District Judge accordingly erred in submitting to the jury both the issue of excessive speed and the issue of the muddy conditions under which appellee worked some time prior to the accident. Only the issue of excessive speed should have been so submitted. The verdict rendered by the jury was a general one with no way to determine on which of the two issues it was based. Under such conditions the Appellant is entitled to a new trial."

In discussing the other matters referred to as errors by respondent, which is merely *dictum,* the Court of Appeals said (R. 411):

> "We believe the testimony was improperly admitted."

This was with reference to the testimony of Banning that he had never ridden on a freight car that came in contact with another portion of the train at as high a rate of speed as the one involved in the accident. We submit that the Court of Appeals was ill-advised in making this remark for the reason that under examination by the District Court, without objection on the part of respondent, in answer to the Court's question (R. 96), Petitioner testified:

> Q. (Court) "What difference was there with reference to the contact, if any? Do you understand what I mean by 'contact'? Your car going together with another car."
>
> A. "Yes, sir. There was a great contact. They came together with a greater force than I ever experienced on before. I had been in a similar operation and situation 15-20 times before when we made drops of that sort; after the contact my hands and feet were jerked loose, I knew I was falling but there was nothing to grab there after I was jerked loose."

In other words, the gist of the testimony complained of was in the record without objection.

On page 9 of its brief, respondent complains that its conductor, Mr. Toombs, and its engineer, Mr. Ruetz, were not permitted to testify as to whether the switching movement in question "*was or was not normal*". (Our italics.) We think the court properly sustained our objection to the question and the reasons he gave were logical (R. 235-256). Neither the Court, the lawyers or the jury could possibly have any idea of what these witnesses would consider normal, nor whether the witnesses were testifying, or would have testified, that the making of a flying switch was a normal and usual operation, or, whether the witnesses would have indicated that the speed, considering the surrounding circumstances, was normal. We feel that the evidence of these two witnesses was properly excluded by the court.

The Court of Appeals also criticized the District Court for admitting certain testimony of Dr. Conley as to petitioner's pain, stating that "Dr. Conley's testimony should have been confined to the X-ray pictures without reference to appellee's pain, about which he had no personal knowledge" (R. 412).

We suggest that this criticism was ill-advised. Dr. Conley's evidence on the subject was as follows (Direct examination—R. 145):

> Q. "What I'm getting at, is there sufficient pathology shown by the picture to justify a medical man, basing his opinion on reasonable medical certainty, to say that the man could or could not have such pain?"
>
> A. "I say that the fracture and invasion of the spine are a competent and sufficient cause for pain."

It will be noted that the doctor did not testify that the injured petitioner did suffer pain.

It will be noted from the opinion of the Court of Appeals (R. 410-411) that the rulings of the District Court on the reception and rejection of this evidence was not considered reversible error but that the error relied upon to reverse the judgment was singly and purely a question of law revolving around the two charges of negligence. In other words, the Court of Appeals, in substance, stated that it would not have reversed the judgment of the District Court if the Court had instructed the jury as follows: Plaintiff has charged in his complaint that the defendant failed to furnish him a safe place in which to work *in this respect,* first, that he was directed and required to work in the yard under muddy conditions * * * and second, that defendant dropped the car upon which plaintiff was riding * * * at a dangerous rate of speed * * *", instead of "Plaintiff has charged in his complaint that the defendant failed to furnish him a safe place in which to work *in two respects,* first, that he was directed and required to work in the yard under muddy conditions * * * and second, that defendant dropped the car upon which plaintiff was riding * * * at a dangerous rate of speed * * *".

In other words, the Court of Appeals set aside the verdict of the jury, the judgment of the trial court and directed a new trial because the word "*two*" was used instead of the word "*this*" in the Judge's charge to the jury. The remedies and measure of damages under the Federal Employers' Liability Act, 45 U.S.C.A., 51 *et seq.,* are never positive, never liquidated, and not possibly the subject of pre-determination. The Federal Employers' Liability Act, like all laws, can be only as effective as its enforcement and its practical application.

However, deserving the case, the railroad can, if it desires, sit back and refuse to negotiate a settlement or pay a dollar until a final unappealable judgment has been obtained in the appellate courts. This means that a railroad family, in which the breadwinner has been disabled or killed, may be without any means of support for three years, as in the case at bar, and until the successful termination of the litigation. This creates a *practical problem* intrinsically inherent in the problem of law here at hand. It requires a practical approach and decision.

Following the reversal of the case, the Court of Appeals, by way of *dictum*, suggested that it "*believed* the trial Court erred in rulings on evidence" and suggested that on a retrial the court make opposite rulings. We contend a reading of the opinion of the Court of Appeals will demonstrate that these rulings had no part in the Court's reversal of the case, and, that such rulings were not considered by the Court of Appeals as reversible errors.

On page 10 of its brief, respondent's attorneys argue that certiorari should be denied, which statement is in contravention with their cross-petition for certiorari and their prayer for certiorari on page 40 of their brief. Respondent bases its reason for denying petitioner certiorari upon the dissenting opinion of Justice Roberts in the case of *Bailey* v. *Central Vermont Railroad Co.*, 319 U. S. 350, 63 S. Ct. 1062 (1943). Certiorari has been held to be appropriate to review interlocutory decrees of the Court of Appeals where the question of law involved was deemed to be special and important and where a Circuit Court of Appeals has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter or has decided a federal question in a way

probably in conflict with the applicable decisions of the Supreme Court; (See Rule 38-5b of the Rules of the Supreme Court of the United States) and where the position of the petitioner was one in which, if correct, rendered the judgment of the Court of Appeals wholly void. See *Tiller* v. *Atlantic Coast Line R. Co.*, 323 U. S. 574, 65 S. Ct. 421 (1945).

This Court, following the rule laid down in the *Tiller* case, granted certiorari to review the judgment of the Court of Appeals, Third Circuit, in the case of *Callen* v. *Pennsylvania R. Co.*, 332 U. S. 625, 68 S. Ct. 296 (1948). See also *American Construction Co.* v. *Jacksonville T. & K. W. Ry. Co.*, 148 U. S. 372 (37 L. Ed. 486); *Spiller* v. *Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117 (64 L. Ed. 810); *George A. Fuller Co.* v. *Otis Elevator Co.*, 245 U. S. 489 (62 L. Ed. 422); and *U. S.* v. *Gulf Refining Co.*, 268 U. S. 542 (69 L. Ed. 1082).

Respondent, in no brief or argument, has been able to explain why the defendant railroad company could not have supplied petitioner with the same kind of a pathway to work upon along the distillery track as the path along the main line which was dry and composed of gravel and cinders. This condition, together with the rough handling of the train all goes to the proposition of whether defendant railroad company used reasonable care to furnish plaintiff a reasonably safe place in which to work.

For cases upon which we rely we ask the court to see cases cited by us in our original brief (15-17), also *Stanczak* v. *Pennsylvania R. Co.*, 174 F. 2d 43, 47.

This Court may take judicial notice of the ordinary, known occurrences in everyday life which are perfectly apparent and a matter of common knowledge. All that

was necessary to do in making the flying switch was to have just enough speed so that the two cars would clear the switch upon which the engine had passed; it was not necessary, but only a matter of saving time, that the cars were handled at the greater speed in order to make the coupling without another movement.

On page 16 of respondent's answer they complain of the charge to the jury. If the court considers this point, we ask that it read the complete charge which was so weighed in favor of the defendant railroad company that plaintiff entered an objection (R. 345). A reading of the charge of the District Court will disclose that the jury could not possibly have been misled by the charge.

On page 17 of respondent's answer it gives its interpretation of the cases cited in our original brief on pages 13 and 14. We, of course, disagree with the interpretation put upon those cases by respondent and submit that interpretation is not in accord with decisions of this Court and of other Courts of Appeal heretofore cited in this brief.

The Court of Appeals incorrectly decided that the District Court was in error in submitting to the jury the issue of the alleged negligence of the railroad company in that Banning "Was directed and required to work in the yard under muddy conditions so that his boots became slippery and covered with mud."

The foregoing is respondent's second sub-title and is found on page 11 of its brief. Your authors have not changed their position as to the law governing this case. We admit that where no evidence is submitted on an issue standing alone, such issue should not go to the jury. That is exactly the situation in the cases discussed by respond-

ent beginning on page 12. In the *Rashaw* case upon which respondent relies, there were two charges, one that the trestle or bridge was narrow, making a dangerous place in which to work, and the other was that ice had formed upon the ties and right-of-way, as a result of steam escaping from the locomotive in that vicinity. Not only was there no evidence of the icy condition, which was submitted to the jury, but apparently the only witness to testify about the ice was the conductor who stated that there was no steam escaping from the engine at that point.

Likewise in the *Christian* case upon which respondent relies, there were two charges of negligence, one that the crossing where the locomotive jumped the track was in bad repair, and the other, that the engineer on the pusher engine failed to turn the cut-out valve on the air brake system. On the latter charge there was no evidence whatsoever of such failure.

The other case relied upon by respondent is *Katila* v. *B. & O. R. R. Co.* This case supports our position that all the circumstances surrounding and leading up to petitioner's injury were for the jury. Here the Court said, and we quote from page 13 of respondent's brief:

> "* * * there may not be adequate assay of total negligence unless all negligence supported by evidence is given consideration. This would seem to be the command of reason as we think it is the mandate of authority."

It is perfectly evident from reading this case that it was reversed for the reason that the Court, in its instructions, failed to give the plaintiff the benefit of the law on comparative negligence. In the case at bar, there are probative facts of both, the muddy conditions, and the rough handling from which reasonable inferences of negligence could have been drawn by the jury.

We again briefly submit that beginning with the time the eight cars, loaded with gravel, were placed with set brakes upon the main line; the movement of the engine from that part of the train, the coupling up of those cars with the engine when petitioner walked in two inches of thin, sloppy mud, was a link in the chain of events that caused plaintiff's injury. The movement of those cars to the main track, far enough distant from the switch where the locomotive was to pass, in order to allow the cars to continue down the main line in which a speed of 12 miles an hour was reached at the time when the engine was uncoupled by petitioner, who thereupon climbed the ladder and crawled upon the braking platform, released the brake ratchet and crossed Harrison Street 200 feet distant from the end of the first standing car was but another chain forged in this link. The steady application of the brakes on up until the collision, the condition of the braking platform, the wet, sloppy mud on petitioner's boots and the violent collision, while the cars were moving at a speed of 6-7 miles an hour, all formed one continuous chain of circumstances resulting in plaintiff's injury.

Under the rule laid down in the *Katila* case above, as we interpret it, the trial court would have committed error had he not included in his charge to the jury all of the circumstances shown by the evidence.

On page 18 respondent gives its version of the rule laid down in *Cross* v. *Ryan,* 124 F. 2d 883, and contends that although there were several charges of negligence, it all simmered down to the single matter of a drunken brawl in a saloon. This summarization is exactly in accord with our theory that the several acts of negligence charged in the case at bar simmered down to a question of respondent's negligence in furnishing petitioner with a safe place in which to work.

On pages 19-25, inclusive, of its brief, the respondent devotes attention to the evidence in the case. This Court is thoroughly familiar with the evidence and more thoroughly with the fact that questions of fact are questions for the jury.

We contend that there was sufficient evidence of the muddy condition when connected with all the other evidence and circumstances to form a reasonable basis from which the jury could have inferred that the thin, sloppy mud on petitioner's boots augmented the hazards shown by the other evidence, made his position on the wet platform more hazardous, his footing less secure and contributed to his injury. In support of this position may we again cite *Lavender* v. *Kurn*, 327 U. S. 645, 66 S. Ct. 740, where the court on page 652 stated:

> "It is true that there is evidence tending to show that it was physically and mathematically impossible for the hook to strike Haney. And there are facts from which it might reasonably be inferred that Haney was murdered. But such evidence has become irrelevant upon appeal, there being a reasonable basis in the record for inferring that the hook struck Haney. The jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of the witnesses and arrive at a conclusion opposite from the one reached by the jury. See *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 67-68; *Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350, 353-354; *Tennant* v. *Peoria & P. U. R. Co.*, 321 U. S. 29, 35. See also Moore, 'Recent Trends in Judicial Interpretation in Railroad Cases Under the Federal Employers' Liability Act,' 29 Marquette L. Rev. 73."

On page 653 of the same case this Court said:

> "Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear."

We seriously contend that under the rule of law laid down by this Court with reference to the weighing of evidence in the cases of *Tennant* v. *Peoria & P. U. R. Co.*, 321 U. S. 29, 35, and *Lavender* v. *Kurn*, 327 U. S. 645, 66 S. Ct. 740, the Court of Appeals in reversing the judgment in the case at bar went afield and beyond the scope of its authority by substituting its judgment in place of that of the jury and trial judge.

We trust that respondent was more serious regarding its other contentions in its brief than its contention that, in any event the case would have to be retried or resubmitted to the Court of Appeals on the question of damages (its answer p. 25). In this respect may we call the Court's attention to the case of *Scott* v. *Baltimore & O. Ry. Co.*, 3rd Cir., 1945, 151 F. 2d 61. In this case the defendant urged that the damages were excessive. In passing upon this question, the Court said on page 64:

> "The damages were fixed by the jury and the verdict was reviewed, so far as the judge had control over the jury's action, by the District Court upon the motion for a new trial. Judicial control of the jury's verdict in this kind of case is primarily for the trial court. *Dubrock* v. *Interstate Motor Freight System*, 3 Cir., 1944, 143 F. 2d 304. A long list of cases in the federal courts demonstrates clearly that the federal appellate courts, including the Supreme Court, will not review a judgment for excessiveness of damages even in cases where the amount of damage is capable of much more precise ascertainment than it is in a personal injury case."

CONCLUSION.

We again request that the judgment of the United States Court of Appeals, Sixth Circuit, decided on April 5, 1949, be reversed.

Respectfully submitted,

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